No. 84621

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,

Respondent,

v.

GERALD M. ELAM,

Appellant.

Appeal from the Circuit Court of Livingston County, Missouri
The Honorable Kenneth R. Lewis, Judge

RESPONDENT'S SUBSTITUTE STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This appeal is from a conviction for first degree murder, §565.020, RSMo 2000,[1] armed criminal action, §571.015, and second degree arson, §569.050, obtained in the Circuit Court of Livingston County, and for which appellant was sentenced to consecutive sentences of life imprisonment without the possibility of parole, life imprisonment, and seven years, respectively. The Missouri Court of Appeals, Western District, affirmed appellant's conviction and sentence. ***State v. Elam***, No. WD59349 (Mo.App.W.D., May 21, 2002). It denied appellant's motion for rehearing or transfer to the Supreme Court on July 2, 2002.

This appeal does not involve any of the categories reserved for the exclusive appellate jurisdiction of the Supreme Court of Missouri. On August 27, 2002, pursuant to Supreme Court Rules 30.27 and 83.04, this case was transferred to this Court. Therefore, this court now has jurisdiction of this appeal pursuant to Article V, §10, Missouri Constitution (as amended 1982).

[1]All statutory citations are to RSMo 2000 unless otherwise stated.

STATEMENT OF FACTS

Appellant Gerald Elam, was charged via information in Macon County with first degree murder, armed criminal action, and second degree arson (LF 3, 7-8, 9-11, 12-14, 36-38). Appellant was subjected to a psychiatric evaluation and, as a result thereof, the court ruled via order on September 25, 1998, that appellant was not at that time competent to stand trial (LF 16-18). On May 5, 1999, the Department of Mental Health informed the court that appellant's unfitness no longer endured and that he was then competent to stand trial (LF 19-20). On appellant's motion, venue was changed to Livingston County (LF 15). On September 13, 2000, appellant filed a motion to stay proceedings under §552.020.1, on the ground that he was not then competent to stand trial (LF 47-48). On September 26, 2000, the court heard and overruled appellant's motion to stay proceedings under §552.020.1, finding that appellant was competent to continue (LF 25-26). On Monday, October 2, 2000, this cause went to trial before a jury in the Circuit Court of Livingston County, the Honorable Kenneth R. Lewis presiding (Tr. 9; LF 26).

Appellant does not challenge the sufficiency of the evidence to support his conviction. Viewed in the light most favorable to the verdict, the evidence adduced at the trial showed the following:

Minis Elam owned an old sale barn, which stood next door to a workshop which belonged to his grandson, Gerald Elam, the appellant (Tr. 236). The barn was standing vacant and appellant wanted his grandfather to turn it over to him so he could turn it into a restaurant (Tr. 236-237). Appellant also wanted Minis Elam to give him money to fix up the

barn (Tr. 237). Harold Miller, a friend of Minis Elam's, said that appellant brought up the subject of the sale barn "most of the time we met." (Tr. 237). Appellant told his cousin's wife that Minis Elam would probably just let the barn rot (Tr. 240).

Late in the afternoon of June 1, 1997, Kristen and Kevin Howlett ran into appellant at the Bait House, in Bevier, Missouri (Tr. 316-317). The Howletts were in the middle of moving and needed a place to go and shower (Tr. 317). Appellant said they could use his house (Tr. 318).

The Howletts arrived at appellant's house at about 5 p.m., but appellant wasn't there (Tr. 318). Appellant arrived about 20 minutes later, and they went in the house and sat and talked while appellant ate (Tr. 318). After appellant finished eating, he began sharpening a hunting knife (Tr. 319). Appellant was sharpening both sides of the blade (Tr. 319). Appellant sharpened the knife the entire evening (Tr. 320). Out of nowhere, appellant said that his grandfather, Minis Elam, had done something to appellant's grandmother years ago and that appellant should have killed him then and wished that he would have (Tr. 320). Kristen Howlett remarked at some point, "You've been sharpening that thing all night. You're not going to kill all of us, are you?" (Tr. 321). Appellant made no response at all (Tr. 321).

Around or about 11:30 on June 3, 1997, Michael Croucher was driving through Callao with his high-beam lights on in his truck (Tr. 152). Croucher stopped at an intersection about a block from the home of Minis Elam (Tr. 153). Croucher saw appellant

walking across the street in front of him, which Croucher thought was unusual given the hour (Tr. 153-154).

Sharon Smith lived south of Bevier, about ten minutes from Callao (Tr. 161). Appellant was an acquaintance of Sharon's (Tr. 162). Sometime between 11 p.m. and midnight on June 2, 1997, appellant stopped by Smith's house (Tr. 162). Smith noticed that appellant was freshly showered, which was unusual for appellant (Tr. 163). The two sat, talked, and did some methamphetamine that appellant had brought (Tr. 163). Appellant told Smith that his grandfather, Minis Elam, was running with a bad crowd (Tr. 165). Appellant said that people who do wrong "eventually get their's." (Tr. 167). Around or about 3 or 4 a.m., Smith told appellant she wanted to go to bed, and appellant left (Tr. 165).

Bruce and Vickie Latchford lived just across the road from Minis Elam (Tr. 171, 182). Latchford and Elam were good friends (Tr. 171). Elam was very active, despite being 87 years old (Tr. 171). About 6:25 a.m. on June 3, 1997, Latchford and his wife, Vickie were getting ready to leave for work (Tr. 172, 184). Latchford was next door checking on an elderly couple's garden (Tr. 172, 184). Vickie took the trash to end of the driveway for pickup and noticed a man running at the end of Minis Elam's property (Tr. 184-185). Latchford heard Vickie yelling (Tr. 173). Vickie ran up to Latchford in the garden and told him, "Somebody just come running from Minis's." (Tr. 173, 186). Latchford asked where and Vickie replied, "On the side of the property." (Tr. 173). The Latchfords started walking along the west side of the neighbor's house and Vickie pointed out appellant running (Tr. 173).

Latchford, not recognizing appellant, ran after him (Tr. 174). Appellant was wearing dark clothing, a short sleeved shirt, a ball cap and dark sunglasses (Tr. 175). Appellant stopped, and Latchford asked him, "What are you doing?" (Tr. 174). Appellant said, "I thought I seen smoke." (Tr. 174). Latchford turned around to look for smoke (Tr. 175). Seeing none, he turned back around and saw that appellant had taken off running (Tr. 175). Latchford looked for him and found him about a block north and saw appellant on a bicycle (Tr. 175-176). Latchford shouted for his wife to bring the pick-up truck (Tr. 176, 187). Vickie brought the truck, Latchford jumped in, and they caught up with appellant (Tr. 176, 187).

Again, Latchford asked appellant, "What are you doing?" (Tr. 176). Appellant said, "I thought I seen smoke on the hill." (Tr. 176). Latchford asked, "Who are you?" (Tr. 176, 188). Appellant replied, "Hoss. You don't recognize me?" (Tr. 176, 188). "Hoss" was appellant's nickname (Tr. 177). Latchford said, "You're Gerald Elam. What are you doing?" (Tr. 176, 188). Appellant again said, "I thought I seen smoke on the hill." (Tr. 176). The Latchfords sped back to Minis Elam's house (Tr. 176).

It was very foggy and hazy that morning, but when the Latchfords got three-quarters of the way down Elam's driveway, they could see smoke coming out of the eaves of the spouts (Tr. 177). Vickie Latchford went back to their house to call 911 (Tr. 188). Latchford opened the back door of the house, which was never locked, but the smoke was too thick, and he could not reach Elam (Tr. 177). Latchford continually shouted for Elam, but received no response (Tr. 178).

Latchford went back outside and around to the north side of the house by the bedroom window (Tr. 178). Latchford broke out the window, reached in, and felt the foot of the bed (Tr. 178). Latchford could not feel Elam (Tr. 179). Thinking Elam was not in the bedroom, Latchford then ran to the front door and went in the living room, thinking he might find Elam in his recliner there (Tr. 179). Latchford's stepdaughter, Amber McAfee, and her boyfriend, Fred Yokum, arrived on the scene with blankets and Latchford tried to enter the house under the blanket (Tr. 179).

After the fire was put out, Shawn Armstrong, the Macon County coroner, went in and viewed Elam's body, which was lying cross-wise on the bed in the bedroom, his feet on the floor (Tr. 191). The body was damaged by the fire, and no other injuries were immediately apparent (Tr. 192). A later autopsy, however, revealed stab wounds to Elam's chest and arms (Tr. 193-194). There were four stab wounds on the left side of the body, one through the upper arm and into the chest, and three more on the left side of the chest (Tr. 341-342). The left lung was punctured and there were two stab wounds to the heart (Tr. 342). The wounds appeared to be caused by a knife with at least a five-inch blade (Tr. 344). It was determined that Elam had died from stab wounds to the heart and lungs (Tr. 195, 344). Elam had died prior to the start of the fire, as he did not breathe in any smoke (Tr. 345). There were mushrooms in Elam's stomach, which indicated that he may have died within an hour or two of eating the mushrooms (Tr. 348).

Robert Dawson, the Macon County Sheriff, had responded to the fire and assisted in controlling traffic in the area (Tr. 205). The Latchfords told Dawson about their encounter

with appellant that morning (Tr. 205-206). Dawson later saw appellant walking up the road, wearing a leather vest, no shirt, and trousers (Tr. 206). Dawson later found appellant's pick-up parked out of sight over a hill(Tr. 208). Dawson spoke to appellant, who looked towards his grandfather's house and asked if it was all right (Tr. 207). Appellant was very calm (Tr. 207). Dawson told appellant that it was not all right (Tr. 207). Dawson asked appellant if he'd been in the area earlier in the morning and if he had seen anything (Tr. 207). Appellant said he had not been in the immediate area (Tr. 208). Dawson asked appellant if he would go with him to the Sheriff's office because they needed to get a statement from him (Tr. 209). Appellant agreed to go (Tr. 209).

At the Sheriff's Office, appellant was read his ***Miranda*** warnings (Tr. 213). Appellant signed the form indicating that he understood his rights and agreed to make a statement (Tr. 214-215). Appellant said he had been riding his bike, but the chain was flying off, so he took it to his garage to repair (Tr. 216). Appellant said that when he was riding his bike, Vickie Latchford saw him and he told her that she should call 911 (Tr. 217). Appellant said he then rode away on his bike (Tr. 217).

Mike Platte of the Highway Patrol also interviewed appellant (Tr. 222). Appellant told Platte that he had spent the night in Bevier at Sharon Smith's house and had left at approximately 5:00 a.m. (Tr. 223). Appellant said that he went home and did laundry for an hour and then went into Callao at 6 a.m. to buy a package of cigarettes (Tr. 223). The store was closed, however, so appellant said he then went to his workshop in town (Tr. 224). Appellant said he worked on his bicycle and then rode it toward his grandfather's house (Tr.

225). Appellant said that he saw smoke in the general vicinity, and he wanted to see where it was coming from (Tr. 225).

Appellant said he stopped about two blocks from his grandfather's house, got off his bike, and went on in the general direction of the house (Tr. 225). Appellant said he saw Vickie Latchford outside, so he ran towards her (Tr. 225). Appellant said Bruce Latchford then came out of their house and appellant pointed out the smoke to the Latchfords and told them to call 911 while he rode his bike back to his shop to look for help (Tr. 225). Appellant said he saw people headed in the general vicinity of the house, assumed someone had called 911, and so did not look for help himself (Tr. 225). Instead, he went back to his workshop, put his bike in the shop, got in his pick-up and drove back to Minis Elam's house (Tr. 226).

Appellant said that the last time he had seen Minis Elam was a month before (Tr. 226). He could not remember when he had last been at Minis Elam's house (Tr. 226). Appellant said that the family was not very close (Tr. 226).

When asked whether he thought the fire was accidental or intentional, appellant responded that he thought the fire was intentionally set because of the way he was being questioned (Tr. 228). Appellant said he knew of no one who would have a reason to burn his grandfather's house (Tr. 228). When asked what was used to start the fire, appellant responded that it was only speculation and that he hadn't even been sure the fire was coming from his grandfather's place (Tr. 228-229). When asked what should happen to the people who had burned the house, appellant responded, "I don't know, probably some kind of judgment. If they are responsible they should answer for it, provided in a fair way." (Tr.

229). When asked what he meant by that, appellant replied that they probably needed psychological help (Tr. 229). When asked what reason there would have been to set a fire, appellant suggested that someone might have been trying to rob his grandfather (Tr. 229).

Sgt. Platte asked appellant why, when he was only a block from his grandfather's home and he saw the smoke rising over it, he didn't go further to make sure that everything was okay (Tr. 230). Appellant said that he had become nervous and panicked when the Latchfords saw him because it looked bad, him seeing the fire and being seen on foot (Tr. 230). Platte told appellant that he didn't think he was telling the truth and that he was holding something back (Tr. 230). Appellant replied, "I've told you everything I can." (Tr. 230). When Sgt. Platte told appellant that he felt appellant had only told him 75% of the truth, appellant said he was sorry that Platte felt that way (Tr. 231).

Randy King, a sergeant with the Missouri State Highway Patrol, also interviewed appellant on June 5, 1997 (Tr. 245). Appellant told King that he and his grandfather did not get along very well and that his grandfather did not care for him (Tr. 247). At first appellant denied being at the house on June 3, 1997, but when Sgt. King told appellant he had been seen coming from the house, walking through the timber, and entering the highway, appellant began weeping and said, "They seen me. I just wanted to get it over with." (Tr. 249-251). Appellant later stated that he had gone to his grandfather's house early in the morning (Tr. 249).

Appellant told King that he had been at Smith's house, had gone home, then into town to get cigarettes, and was waiting for the store to open when he decided to go to his

grandfather's house (Tr. 252). Appellant said he had a lot of questions that his grandfather needed to answer (Tr. 252). Appellant said that, at the house, he walked by the kitchen table, picked up a knife and walked toward the bedroom (Tr. 252). Appellant said he needed the knife because his grandfather had told him that he would shoot him with a shotgun if he came to the house (Tr. 253). Appellant claimed that in the bedroom, his grandfather said, "Why you?" and started swinging at him (Tr. 253). Appellant said he reached out, defending himself, and stabbed Elam four or five times (Tr. 253). Appellant said he threw the knife into the kitchen (Tr. 254).

There was a grease pan on the stove (Tr. 254, 255). Appellant turned the stove on and turned the heat up on high (Tr. 254, 255). Appellant told King he had hoped to cover up the murder and he "wouldn't have to be going through all this." (Tr. 255). Appellant said he thought the fire had started prior to his leaving the house (Tr. 254).

On June 6, 1997, appellant gave another statement. This time, appellant said that when he walked in the house, he shouted, "Hey, you up?" (St.Exh. 24). Minis Elam was in the bedroom and, when he saw appellant, he came running out (St.Exh. 24). Appellant said he picked up a knife because he was afraid that his grandfather might have a gun because he had told him that if he came to the house, he would shoot him (St.Exh. 24). According to appellant, Minis Elam was in the bedroom doorway (St.Exh. 24). Minis Elam said, "Why you" and came at appellant, swinging his arms (St.Exh. 24). Appellant said he used the knife to defend himself and that Elam "just throwed back on the bed and there he lay." (St.Exh. 24). He claimed that he picked up a knife from the kitchen table in the house (Tr. 220).

Appellant said that he had gone to Elam's house, accused him in the bedroom, Elam stood up, and appellant struck back in self-defense with the knife (Tr. 220).

Appellant said he turned the stove on high, and that he had "probably helped" start the house on fire (St.Exh. 24). The hair on the back of one of his hands had been singed off (St.Exh. 24).

Appellant said he ran straight south from the house into the woods, then turned and ran west to Highway 3 (St.Exh. 24). Then he got his bike and rode through town (St.Exh. 24). Appellant said he went home, but then he thought he should go back and face up to what had happened (St.Exh. 24). Appellant told Sgt. King that he didn't think it appropriate if he went to prison for the rest of his life (Tr. 264). Appellant asked Sgt. King to tell his parents what he had done (Tr. 262).

Appellant said he had worked on his grandfather's farm his whole life and "never really got a whole lot of anything." (St.Exh. 24). Appellant said his grandfather never came through with anything that he'd ever promised (St.Exh. 24). Appellant implied that his grandfather always managed to put a stop to his plans (St.Exh. 24). Appellant said that the "shutting out" by his grandfather is what led to the confrontation (St.Exh. 24).

While in jail, appellant talked to Stephen McQuinn, who spent a day in jail for failing to pay a speeding ticket (Tr. 330-331). Appellant said that his father and grandfather were "from the devil" and that they would not help him financially (Tr. 331). Appellant told McQuinn that he had gone to his father to borrow some money, but his father would not give it to him, so he then went to his grandfather (Tr. 331). His grandfather would not give it to

him, and they got in an argument, appellant hit his grandfather, and "he fell back and fell down." (Tr. 331-332). Appellant said it was an accident (Tr. 332). Appellant also said that he set the house on fire twice (Tr. 332). Appellant said he left and then came back and used gasoline on it the second time because the fire went out the first time (Tr. 333, 336).

Investigations ruled out that the fire had been caused by any of the gas appliances in the house (Tr. 278). A frying pan was found on the stove, with a burn mark on the bottom of the pan, indicating that it had been on the burner for some time (Tr. 278). The control for that burner was in the on position (Tr. 279). The fire had been concentrated in the kitchen/dining room area of the house, and there was a pattern on the floor indicating a flammable liquid had been poured (Tr. 279). The burn pattern ran through the kitchen to the back door of the residence, then ran back into the dining room and around toward the bedroom (Tr. 280). Containers of flammable liquid were found in the backyard (Tr. 281). Among these was a can of turpentine (Tr. 282). Tests determined that the liquid poured on the floor had been a mixture of turpentine and gasoline (Tr. 300, 309). While the stove may have contributed to the fire, the pan on the stove would not have ignited the flammable liquid on the floor (Tr. 300-301). The fire started within the hour before the call to the fire department had been called (Tr. 302).

Ron Techau, one of the firemen who responded to Elam's home to put out the fire, was walking through the house after the fire had been put out and saw a sharp-bladed pointed knife with a six-inch blade and a charred wooden handle (Tr. 200-201). Techau mentioned the knife to law enforcement officials (Tr. 201). Three days later, after the police had

arrested and interviewed appellant, they went back to the house to search for the knife, but could not find it (Tr. 271).

In his defense, appellant presented the testimony of Dr. Rosalyn Inniss, who testified that appellant had a schizoaffective disorder, bipolar type (Tr. 394, 400). Dr. Inniss said that appellant did not understand and appreciate the nature and quality or wrongfulness of his conduct (Tr. 400). Dr. Inniss testified that appellant was incapable of deliberating upon the death of his grandfather (Tr. 407).

At the close of evidence, instructions, and argument by counsel, the jury found appellant guilty as charged (LF 27, 86-88). The court found appellant to be a prior offender (Tr. 12; LF 26). The court sentenced appellant to life imprisonment without the possibility of parole for the first degree murder, life imprisonment on the armed criminal action charge, and seven years on the second degree arson count, all sentences to be served consecutively (LF 28, 103-104).

The Missouri Court of Appeals, Western District, affirmed appellant's convictions and sentences on direct appeal. ***State v. Gerald Elam***, No. WD59349 (Mo.App.W.D., May 21, 2002). It denied appellant's motion for rehearing or transfer to the Supreme Court on July 2, 2002. On August 27, 2002, pursuant to Supreme Court Rules 30.27 and 83.04, this Court granted appellant's motion to transfer the case to this Court.

ARGUMENT

I.

THE TRIAL COURT DID NOT ERR IN FINDING APPELLANT COMPETENT TO STAND TRIAL BECAUSE THERE WAS EVIDENCE FROM WHICH THE COURT COULD FIND THAT APPELLANT HAD SUFFICIENT PRESENT ABILITY TO CONSULT WITH HIS ATTORNEY WITH A REASONABLE DEGREE OF RATIONAL UNDERSTANDING AND HAD A RATIONAL AND FACTUAL UNDERSTANDING OF THE PROCEEDINGS AGAINST HIM IN THAT APPELLANT'S DEMEANOR IN COURT AND INTERACTIONS WITH THE COURT AND OTHER AUTHORITIES INDICATED AN AWARENESS OF HIS SITUATION AND A PRESENT ABILITY TO RATIONALLY ADDRESS THE LEGAL ISSUES HE FACED, THE MOST RECENT EVALUATION FROM THE DEPARTMENT OF MENTAL HEALTH DEMONSTRATED THAT APPELLANT UNDERSTOOD THE LEGAL PROCEEDINGS AND WAS ABLE TO CONSULT WITH COUNSEL, AND APPELLANT'S EVIDENCE DID NOT DEMONSTRATE THAT HE WAS NOT ABLE TO DO SO.

Appellant contends that the trial court erred in finding him competent to stand trial.

On May 27, 1997, the trial court sustained appellant's request for a mental examination (LF 4). On March 2, 1998, Dr. John Zimmerschied issued a pretrial evaluation per the court's order and found that appellant was not competent to stand trial.

Zimmerschied noted that appellant understood the charge against him, but believed his act was self-defense (SLF 8). He knew his attorney's name and that his attorney was to work on his behalf (SLF 8). Appellant could name the prosecutor and the judge, but when asked the role of the judge, appellant went off on a tangent and claimed that the judge had threatened him because he had been dating the judge's daughter (SLF 8). Appellant also said he thought the judge used to buy cocaine from his grandfather, Minis Elam, the victim in the case (SLF 8). Zimmerschied described appellant's thought process as "tangential" and noted that he "was preoccupied by ever expanding delusions involving not only the victim of the crime but also law enforcement, county officials and even the judge" and was intent on airing these allegations in a courtroom regarding alleged suspicious deaths, and the involvement of the family doctor, the judge and the prosecutor in allegations of drug dealing and satanic activity. (SLF 8).

After a hearing, the trial court ruled on September 9, 1998, that appellant suffered from a mental disease – schizoaffective disorder – and that he was "not presently able to understand the proceedings against him and/or to assist in his own defense." (LF 16-17). In April, 1999, appellant was reevaluated, this time by Dr. Hossein Mojdehi, a psychologist, and Dr. Michael P. Stacy, a certified forensic examiner at Fulton State Hospital (SLF 18). This evaluation found appellant competent to stand trial. Appellant possessed "adequate knowledge regarding the charges against him and the legal proceedings." (SLF 16). He identified the charges against him and the class of each offense (SLF 16). He recognized the range of penalties and discussed his options, including a Not Guilty by Reason of Insanity

(NGRI) plea (SLF 16). He expressed some misgivings about his lawyer, but generally was positive and referred to him as a good lawyer who knew what he was doing (SLF 16). Appellant indicated an understanding of needing to trust and cooperate with his attorney (SLF 16).

Appellant also appeared familiar with the roles and functions of the judge and prosecutor (SLF 16). He knew the difference between a bench and jury trial and was able to explain the composition of a potential jury (SLF 16). Appellant said that the first degree murder charge was unjust because he had acted in self-defense and the murder was not premeditated (SLF 16).

The evaluators noted that appellant still voiced some delusional ideations regarding his grandfather (SLF 17). However, none of appellant's symptoms interfered with his understanding of his legal status (SLF 17). The evaluators found that "it appears that Mr. Elam's mental disease at the present time does not have a significant bearing on his appreciation of his legal status or his ability to work out a defense strategy. It is, therefore, the opinion of the undersigned with a reasonable degree of psychological certainty that he presently possesses the capacity to understand the proceedings against him and to assist in his own defense." (SLF 17).

On September 13, 2000, slightly less than three weeks before appellant's case was to go to trial, appellant filed a motion to stay proceedings under §552.020.1 (LF 47-48). Appellant asserted since he had been transferred from Fulton State Hospital to Macon

County Jail, he had not followed his medication regimen and was no longer competent to proceed (LF 47).

On September 26, 2000, a hearing was held on appellant's motion. A psychiatrist hired by the defense, Dr. Rosalyn Inniss, testified on appellant's behalf.

Dr. Inniss had first met with appellant on June 5, 2000 (STR 7). She met with appellant a total of five times, for a grand total of about 18 hours (STR 8). Dr. Inniss also reviewed appellant's audiotaped statements with law enforcement officers and all of his mental health records (STR 9). Dr. Inniss believed that appellant suffered from schizoaffective disorder, bipolar type (STR 11). Dr. Inniss testified that she thought appellant was limited in his ability to fully understand the proceedings and that he would be "most challenged" in his ability to give reasonable assistance to counsel in pursuing his defense (STR 14). When asked why, Dr. Inniss testified that she had "watched Mr. Elam's delusions broaden and become more intrusive into his conversation and functioning" (STR 14). Dr. Inniss said that he would not be able to give his attorney "feed-back and input regarding what has taken place based on the reality of what has taken place" as opposed to his delusions (STR 15). Dr. Inniss based this claim on purported delusional beliefs of appellant's that people were hiding information, lying, and that certain activities occurred at his preliminary hearing that the court had used against him to put him in jail (STR 15). Appellant purportedly believed that the judge at the pretrial hearing (who was not the trial judge) had doctored the tapes of the hearing so information in his favor would not be reflected therein (STR 16). Dr. Inniss testified that appellant claimed his prior attorney had

stolen information from him about an invention, and that the police officers who questioned him had done things in order to "set him up" (STR 16-17). Appellant also allegedly said that there were vials and other items at the scene of the fire which would have supported his belief that his grandfather was practicing witchcraft (STR 17). Dr. Inniss believed that appellant needed to be back on medication which would serve to make his thinking less delusional (STR 18). Dr. Inniss believed that appellant needed to be back on medication before proceeding with the case (STR 23).

Dr. Inniss agreed that she had gone through an informed consent process prior to interviewing appellant, whereby she explained to him who she was, what she was doing, and to whom she might have to turn over information she learned from him, and that appellant appeared to understand all of those concepts (STR 27-28). Dr. Inniss did not perform any original testing on appellant but relied on prior psychological testing (STR 31). Dr. Innis estimated that appellant had been suffering from a mental illness since 1992, but admitted that he was able to perform activities of daily living (STR 34). She observed that appellant had been able to successfully travel to and from Israel (STR 37). Dr. Inniss agreed that appellant appeared to be paying attention throughout the hearing (STR 40). Dr. Inniss could not remember if she had inquired of defense counsel as to how appellant had behaved in a court hearing a week prior (STR 40). She agreed that such information would have been important (STR 41). When shown some letters that appellant had written to the Macon County Commissioners addressing complaints he had while incarcerated in jail, Dr. Inniss agreed that the letters reflected an appropriate response to problems appellant perceived (SLF

42-43). Dr. Inniss agreed that appellant demonstrated awareness of what was happening around him when he filed a burglary report after overhearing individuals in jail describing items which he recognized had been burglarized (SLF 44). Dr. Inniss also agreed that letters appellant had written to the judge regarding some concerns and troubles with his attorney indicated an awareness of appellant's surroundings and his ability to appropriately address concerns regarding his case (STR 45-47). Dr. Inniss agreed that a list of witnesses appellant provided "made sense." (STR 49).

Sgt. Mike Platte also testified at the hearing as to what had occurred the week prior at a hearing on a motion to suppress (STR 60). Sgt. Platte testified that while Dr. Zimmerschied had been testifying as to appellant's competency at that motion to suppress hearing, appellant turned to Sgt. Platte and Sgt. King, who were sitting in the back row of the courtroom and "gave us what I would consider to be a cat that swallowed the canary type look. It was a grin, like, 'Got you'." (STR 61). He smiled at Sgt. Platte and Sgt. King for about five to ten seconds, then turned and faced the witness stand again (STR 61). However, when the judge ruled against appellant on the motion to suppress, appellant turned and glared at the officers (STR 62).

This concluded the evidence at the hearing on the issue of appellant's competency to stand trial. After very brief argument by counsel, the trial court then ruled as follows:

> The defendant is presumed to have the mental capacity and fitness to proceed. The defendant has not proven by a preponderance of the evidence that he does not have the mental fitness to proceed. The exhibits admitted as

> well as the testimony together with the Court's observations of the defendant and the record in this cause belies any allegation that the defendant is unable to assist in his defense. He has been articulate and aware of his circumstances and has so far become involved beyond the usual in the defense of is [sic] case. Court finds there is nothing in the record, in the statements of the defendant, in his correspondence to the Court, that would indicate any mental disease or defect or inability to proceed. The Court, therefore, overrules the defendant's motion to stay proceedings under Section 552.020(1).

(STR 64-65).

The trial and conviction of a person who is legally incompetent constitute a denial of due process. ***State v. Tokar***, 918 S.W.2d 753, 762 (Mo. banc 1996), ***cert. denied*** 117 S.Ct. 307 (1996). A defendant is competent to stand trial if he has sufficient present ability to consult with his attorney with a reasonable degree of rational understanding, and if he has a rational as well as factual understanding of the proceedings against him. ***Tokar,*** 913 S.W.2d at 762 (quoting ***Dusky v. United States***, 362 U.S. 402, 80 S.Ct. 788, 789, 4 L.Ed.2d 824 (1960)). This standard is implicitly incorporated into §552.020.1 RSMo 1994, which states: "No person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted or sentenced for the commission of an offense so long as the incapacity endures."

The determination of competency by the trial court is a finding of fact and must stand unless no substantial evidence exists to support it. ***State v. Frezzell,*** 958 S.W.2d 101, 104

(Mo.App.W.D. 1998). In testing the sufficiency of the trial court's ruling, the reviewing court should not weigh the evidence, but must accept as true all evidence and reasonable inferences that tend to support the trial court's finding. ***State v. Wilkins***, 736 S.W.2d 409, 415 (Mo.banc 1987), affirmed sub nom. ***Stanford v. Kentucky***, 492 U.S. 361, 109 S.Ct. 2969, 107 L.Ed.2d 306 (1989). It is defendant's burden to prove he is incompetent to stand trial and assist in his defense. ***State v. Caudill***, 789 S.W.2d 213, 215 (Mo.App.W.D. 1990).

Accepting as true all evidence and reasonable inferences that tend to support the trial court's findings, ***State v. Petty***, 856 S.W.2d 351, 353 (Mo.App.S.D. 1993), there was sufficient evidence in the present case to support the trial court's finding that appellant was competent to stand trial in that the report of Drs. Mojdehi and Stacy indicate that appellant was competent and appellant's behavior demonstrated his ability to rationally understand the proceedings and to consult with counsel.

The report of Drs. Mojdehi and Stacy, as discussed prior, indicated that appellant was competent to stand trial in that he understood the proceedings and the roles of all parties involved and demonstrated an ability to work with counsel, this despite the fact that appellant still had schizoaffective disorder and still appeared delusional (SLF 16-17). Furthermore, appellant via his behavior in appearances before the court, in letters to the court regarding his case and other legal matters affecting him, demonstrated that appellant had a rational understanding of the legal system and was able to rationally consult with the relevant persons in order to pursue and protect his legal interests.

For example, when appellant was upset about his conditions in the jail, he wrote letters to the Macon County Commissioners addressing his complaints and asking them to confront the Sheriff and find a solution (St.Exh.1)[2]. While in jail, appellant overheard another inmate having a conversation about a smoking pipe he had purchased from two other individuals (St.Exh. 2). Appellant recognized that the property was his and made a statement and burglary report to the authorities, filling out a victim rights request form as well (St.Exh. 2). This too demonstrated appellant's ability to recognize what was happening and take appropriate action through appropriate channels, consulting with the people he needed.

Appellant wrote letters to the judge expressing his concerns with his prior attorney and asking what the proper procedure would be for him to address these concerns with the court (St.Exh. 3, 4). He wrote a letter to the judge asking that he be allowed to appear in civilian clothes and in minimum restraint while in court "to present myself . . . in the most respectable manner possible" (St.Exh. 5). He wrote another letter to the judge discussing his concerns about agreeing to continue the case (St.Exh. 6). All of these reflect an ability to

[2]The exhibit numbers, which were handwritten on the exhibits, are those used at the motion hearing. Some of the exhibits were also submitted at trial and have exhibit stickers on them with different numbers.

consult with an attorney and rationally understood the proceedings. Appellant's own expert agreed that the letters reflected awareness of his situation and appropriate responses to problems perceived by appellant (STR 42-47).

Furthermore, appellant provided no evidence to refute the findings of Drs. Mojhedi and Stacy in 1999 demonstrating that appellant was competent to stand trial. While it is true that every time appellant was evaluated, he was always diagnosed with schizoaffective disorder, bipolar type, the actual presence of some degree of mental illness or a need for psychiatric treatment does not equate to incompetency to stand trial. ***Baird v. State***, 906 S.W.2d 746, 750 (Mo.App.W.D. 1995). A defendant is incompetent only if he fails to meet the standards of §552.020, and appellant has failed to meet his burden by proving that he lacked sufficient present ability to consult with his attorney with a reasonable degree of rational understanding, and that he could not have a rational as well as factual understanding of the proceedings against him.

Appellant relies on Dr. Inniss's testimony. But Dr. Inniss, while voicing her opinions that appellant was delusional and that he would have difficulties assisting his attorney, never directly discussed actual specifics regarding appellant's ability to consult with his attorney and his ability to have a rational and factual understanding of the proceedings against him. If one looks, by way of comparison, to the evaluation report of Drs. Mojdehi and Stacy, who found appellant competent in 1999, they discussed specifics – e.g., appellant "was quite familiar with the roles and functions of the other principals in the court including those of the judge and the prosecuting attorney, both of whom he identified by name;" "specifically

stated that he would be 'open' with his legal counsel, trusts him, and would 'tell him everything'"; appellant "correctly named all four charges against him, identified each charge by its class and mentioned the range of penalty if convicted of any of those;" appellant "specifically verbalized the gravity of the alleged offenses and acknowledged the possibility of having to serve a long sentence;" appellant "indicated a full understanding of the plea process including the option of an NGRI defense;" appellant, "when specifically asked what he would do if his legal counsel recommended and NGRI plea . . . stated that he would accept it." (SLF 16-17).

Dr. Inniss's testimony, on the other hand, says nothing as to any of these factors. It is not even apparent from her testimony that she even discussed such matters with appellant. She never directly and specifically contradicted any of these factors. While Dr. Inniss did reference alleged delusions appellant had voiced regarding people out to get him[3] (Tr. 15), she did not report that appellant had any specific delusions regarding the current judge, the prosecutor, defense counsel, etc.

In ***State v. Frezzell***, 958 S.W.2d 101, 105 (Mo.App.W.D. 1998), the defendant was schizophrenic and had delusions, but was found competent where there was evidence that

[3]It would be fairly normal for any defendant to assert that law enforcement were trying to set him up or were out to get him.

he understood the proceedings, the charge against him, the consequences if he were found guilty, and that he specifically discussed defense options and adequately explained his attorney's role. Drs. Mojhedi and Stacy's report indicated appellant could do all of that, and Dr. Inniss's testimony did nothing to indicate that appellant could no longer do those things. Appellant did not meet his burden. And while appellant may fault the trial court for apparently discounting some or all of Dr. Inniss's testimony, the trial court was certainly free to do that. "It is the duty of the trial court to determine which evidence is more credible and persuasive." ***State v. Johns***, 34 S.W.3d 93, 104, 105 (Mo.banc 2000). In sum, the trial court did not err in finding appellant competent to stand trial because there was evidence that appellant had a rational understanding of the proceedings and was able to consult with his attorney, and appellant did not meet his burden to show otherwise. Appellant's point is without merit and should be denied.

II.

APPELLANT'S CLAIM THAT THE TRIAL COURT COMMITTED PLAIN ERROR BY NOT DECLARING A MISTRIAL *SUA SPONTE* WHEN THE STATE ARGUED TO THE JURY THAT APPELLANT COULD GET OUT OF A MENTAL FACILITY BEFORE THE JURORS EVEN GOT HOME SHOULD BE DENIED WITHOUT EXPLICATION BECAUSE APPELLANT'S FAILURE TO OBJECT IS PRESUMED TO BE A MATTER OF TRIAL STRATEGY. MOREOVER, THE TRIAL COURT DID NOT COMMIT PLAIN ERROR BY NOT GRANTING A MISTRIAL ON ITS OWN MOTION BECAUSE THE PROSECUTOR'S STATEMENT WAS NOT A MISSTATEMENT OF THE LAW BUT AN OBVIOUS RHETORICAL COMMENT, THE ALLEGED ERROR COULD HAVE BEEN CURED BY A REMEDY LESS DRASTIC THAN A MISTRIAL, AND MANIFEST INJUSTICE DID NOT RESULT FROM THE TRIAL COURT'S CONDUCT.

Appellant contends that the trial court should have *sua sponte* declared a mistrial because the state allegedly argued that, if found not guilty by reason of mental disease or defect, appellant could be released before the jury could even get home (App.Br. 46). Appellant contends that the state misstated the law in its argument and the argument improperly commented on appellant's future dangerousness (App.Br. 46).

During appellant's closing argument, defense counsel made the following statements, in pertinent part:

> What we have to do is determine how we do justice. Now, we can lock Gerald away in prison for a long time and in the prisons he will fester with a mental illness for I don't know how long. In the instruction when a person is found not guilty by reason of mental disease or defense excluding responsibility that person must – the Court must commit them to the Director of Mental health's custody in a state mental rehabilitation facility. This person can be conditionally released only if the Court - - when it determines the person does not have and will not have within the recent future a mental disease or defense rendering him dangerous to the safety of himself or others. That instruction says that's what you consider and this is a man who caused the death of his grandfather.

(Tr. 498-499).

> So the question that we come back to is what do we do for justice? Does Gerald go to prison? Does he go to a mental institution maybe indefinitely? Take a hard look at the instructions, ladies and gentlemen, and you will see that the evidence . . . falls squarely within Instruction Number Ten which says that if Gerald's conduct was the result of a mental disease or defect that he was incapable of knowing and appreciating the nature and quality or wrongfulness of his conduct then you must vote not guilty by reason of mental disease or defect, and it sounds - - given the nature of the case it

sounds terrible, doesn't it, but based upon the instruction that's it. Gerald doesn't walk out the door.

(Tr. 503-504).

[S]o my question I want to leave you with is whether you send someone like Gerald to a prison or do we send him to the Department of Mental Health where rather than wasting his life, which may be appropriate, I don't know, instead of wasting it we address some of the conditions. Maybe he's not deserving of help but at least he doesn't fester and fall apart in prison.

(Tr. 505).

In rebuttal, the state said, in pertinent part, as follows:

[T]hey want Gerald to go to a mental hospital. Let me tell you something. He will be allowed to play cards with other inmates. He will be allowed to watch T.V. He won't fester there. He gets treatment for whatever problems he has. If we didn't treat him, you know what? There would be lawsuit after lawsuit about his Constitutional rights, and when Mr. Reed says he'll go to a mental hospital, he can get out of that mental hospital, and do you know when he could get out of it? Before you and I get home from here. He could be in there for the rest of is [sic] life but he could get out that quick. You know how he gets out of there? He gets a psychiatrist to come into court and say, "You know what, Gerald is cured", and do you know what, just like

I asked Doctor Inniss, the greatest protection in the world, no one can tell you you're wrong.

(Tr. 507-508).

Appellant did not object to any of this argument. Claims of error may be waived if no objection is made at trial. ***State v. Parker***, 886 S.W.2d 908, 922-923 (Mo.banc 1994), *cert. denied*, 115 S.Ct. 1827 (1995). "This Court will not review those claims not preserved for appeal, and relief should be rarely granted on assertion of *plain error* to matters contained in closing argument, for trial strategy looms as an important consideration and such assertions are generally denied without explication." ***State v. Clay***, 975 S.W.2d 1212, 134 (Mo.banc 1998), *cert. denied* 119 S.Ct. 834 (1999); ***State v. Cobb***, 875 S.W.2d 533, 537 (Mo.banc 1994), *cert. denied*, 115 S.Ct. 250 (1994). The failure to object during closing argument is more likely a function of trial strategy than of error. ***State v. Boyd***, 844 S.W.2d 524, 529 (Mo.App.E.D. 1992). ***See also State v. Tokar***, 918 S.W.2d 753, 768 (Mo.banc 1996), *cert. denied*, 519 U.S. 933 (1996).

Moreover, in the absence of an objection, the trial court's options are narrowed to uninvited interference with summation and a corresponding increase of error by such intervention. ***State v. Clemmons***, 753 S.W.2d 901, 907-908 (Mo.banc 1988), *cert. denied*, 488 U.S. 948 (1988). Had objection been made, the trial court could have taken appropriate steps to make corrections. ***State v. Kempker***, 824 S.W.2d 909, 911 (Mo.banc 1992). A party cannot fail to request relief, gamble on the verdict, and then if adverse, request relief for the first time on appeal. ***State v. McGee***, 848 S.W.2d 512, 514 (Mo.App.E.D. 1993).

In the case at bar, appellant's failure to object to the remark in question at trial deprived the trial court of the opportunity to take corrective measures short of a mistrial, and is fatal to his claim on appeal. This is because an admonition to the jury normally will be sufficient to cure any prejudicial effect of prosecutorial comments. ***State v. Nolen***, 872 S.W.2d 660, 662 (Mo.App.S.D. 1994).

Even if reviewed, "Relief should rarely be granted on an assertion of plain error with respect to a closing argument." ***State v. Smith***, 32 S.W.3d 532 (Mo.banc 2000). Even when a comment is improper, a conviction will be reversed only where it is established that the comment in question had a decisive effect on the jury's determination. ***State v. Winfield***, 5 S.W.3d 505, 516 (Mo.banc 1999), *cert. denied*, 528 U.S. 1130 (2000). The burden is on the defendant to prove the decisive significance of the complained of comment. ***Id.***

"The 'plain error' rule is to be used sparingly and may not be used to justify a review of every point that has not been otherwise preserved for appellate review." ***State v. Roberts***, 948 S.W.2d 577, 592 (Mo.banc 1997), *cert. denied*, 118 S.Ct. 711 (1998). Appellant must demonstrate that manifest injustice or a miscarriage of justice will occur if the error is not corrected. ***Id.*** "'[U]nless a claim of plain error facially establishes substantial grounds for believing that 'manifest injustice or miscarriage of justice has resulted,' this Court will decline to exercise its discretion to review for plain error under Rule 30.20." ***Id., citing State v. Brown***, 902 S.W.2d 278, 284 (Mo.banc 1995), *cert. denied*, 516 U.S. 1031 (1995).

"Relief under the plain error standard is granted only when an alleged error so substantially affects a defendant's rights that a manifest injustice or miscarriage of justice

inexorably results if left uncorrected. Appellate courts use the plain error rule sparingly and limit its application to those cases where there is a strong, clear demonstration of manifest injustice or miscarriage of justice. The determination of whether plain error exists must be based on a consideration of the facts and circumstances of each case. A defendant bears the burden of demonstrating manifest injustice or miscarriage of justice." ***State v. Varvera***, 897 S.W.2d 198, 201 (Mo.App., S.D. 1995) (citations omitted).

Appellant cannot show that plain error resulted from the prosecutor's argument. Appellant contends that the prosecutor misstated the law because under §552.040.2, appellant could not have even had a hearing for "immediate conditional release" because he was charged with first degree murder (App.Br. 47). However, §552.040.5 provides that a person acquitted based on mental disease or defect and committed to the Department of Mental Health may apply to the court for unconditional release and does not in fact require that any portion of the commitment elapse before this is done. Nor does §552.040.10 require any portion of commitment elapse before an individual may apply for a conditional release. Theoretically, appellant could immediately apply for release.

While the prosecutor's comments may have suggested a metaphysical and practical impossibility in stating that appellant could get out before the jury even got home, the jury would have recognized this impossibility and there was no danger that the jury actually believed that appellant could be immediately free. First of all, the prosecutor also said that appellant had to have a doctor come into court and say he was cured before he could get out, which is true. Secondly, any reasonable juror would recognize that the prosecutor was

engaged in hyperbole in order to demonstrate his point that there was no guarantee as to how long appellant would actually be committed and that he could get out quickly. Appellant, however, further contends that the prosecutor's statements were still misleading because under §552.040.5, when a defendant applies for release, conditional or unconditional, there is a thirty day period in which interested parties may object and a mental examination may be had before there is a hearing on the application (App.Br. 48).

Again, the only suggestion of time made by the prosecutor was the hyperbolic example of getting out before the jury got home (Tr. 508). As already explained above, any reasonable person would recognize that for what it was – hyperbole. The prosecutor did not misstate the law and did not mislead the jury.

Furthermore, the jury was instructed on this issue. Instruction No. 10, patterned after MAI-CR 30.02A, gave detailed guidance to the jury regarding the defense of mental disease or defect (LF 74). Concerning the possibility of release, the instruction informed the jury:

> When a person is found not guilty by reason of mental disease or defect excluding responsibility, the Court must order that person committed to the Director of the Department of Mental Health for custody and care in a state mental health or retardation facility. This person can be unconditionally released from commitment only if and when it is determined by the Court that the person does not have, and in the reasonable future is not likely to have, a mental disease or defect rendering him dangerous to the safety of himself or others. This person can be conditionally released from such custody only if

and when it is determined by a Court that he is not likely to be dangerous to others while on conditional release.

(LF 74). The prosecutor's statement did not contradict anything in the instruction.

Appellant also suggests that the prosecutor's statement was a reference to future dangerousness by appellant and an attempt to instill fear in the jury (App.Br. 53). The prosecutor's statement makes no reference whatsoever to any possible future act of appellant that he might or might not do if he were released from commitment. Appellant cites to ***State v. Tiedt***, 206 S.W.2d 524 (Mo.banc 1947) to support his position. In ***Tiedt***, the prosecutor said, in reference to the defendant: "When he was led away from that scene that night, he was still unsatisfied, still yearning for gore, and he is here now unsatisfied, still yearning. All he needs is just an opportunity." ***Id.*** at 527. "Everyone in this room is a potential victim of his murderous desire." ***Id.*** "What have the good people of the county done that they should be continually under the hazard that would be created by keeping him alive?" ***Id.*** "As long as he lives there will always be the possibility of his repeating on some flimsy excuse, this dire happening, over some dark mistake, that again on some quiet night in the mist of similar circumstances, or similar situation, there is a possibility that gun will repeat its deadly work." ***Id.*** at 528. "I am sure you gentlemen don't want to see again in this community innocent citizens and innocent people struck down by a murderer, their blood spurting from their bodies into the gutter." ***Id.***

How the prosecutor's statement in the present case ("[D]o you know when he could get out of it? Before you and I get home from here") is supposed to be comparable to "I am

sure you . . . don't want to see again . . . innocent people struck down by a murderer, their blood spurting from their bodies into the gutter" is, quite frankly, beyond respondent's grasp. Suffice it to say that the prosecutor's argument in this case made no reference to future dangerous acts by appellant.

It must also be noted that appellant's claim of error was not that the trial court failed to *sua sponte* instruct the jury to disregard but rather, appellant's claim is the trial court erred in failing to *sua sponte* grant the extreme remedy of a mistrial. The Eighth Circuit Court of Appeals has held that a trial court does not err when it fails to grant a mistrial *sua sponte*, ***Branch v. State of Minnesota***, 130 F.3d 305 (8th Cir. 1997), *cert. denied*, 118 S.Ct. 1565 (1998), because a *sua sponte* grant of a mistrial could be considered as interfering with a defendant's trial strategy. In ***State v. Marlow***, 888 S.W.2d 417, 420 (Mo.App.W.D. 1994), this Court found no error when the trial court did not *sua sponte* grant a mistrial when the prosecutor made statements regarding the defendant's failure to testify. This Court noted that if the trial judge had granted a mistrial on its own motion because of the prosecutor's comments, the Double Jeopardy Clause would have precluded a retrial, since any prejudice could have been cured by less drastic action, and therefore there would have been no "manifest necessity" for a mistrial. ***Id. See also State v. Weeks***, 982 S.W.2d 825, 838, n. 13 (Mo.App.S.D. 1998) (discussing the untenable position that a trial court is placed in because of double jeopardy consequences if it grants a mistrial on its own motion).

Finally, respondent would note that appellant, in his transfer motion to this Court, faulted the Court of Appeals for stated that the subject of the state's argument was legitimate.

(App.Mot.Trans. 10). Appellant posits that it was not a legitimate point as it was purported not "the jury's job . . . to decide what should be done with Gerald." (App.Mot.Trans. 10). Appellant ignores his own closing argument, as set out at the beginning of this argument, ***supra***, wherein he repeatedly discusses how justice should be done in this case by sending appellant to a mental institution as opposed to prison. Legitimate or no, appellant certainly made it an issue in his closing argument, and the state was entitled to rebut it. ***State v. Smith***, 32 S.W.3d 532, 553 (Mo.banc 2000) (prosecutor has considerable leeway in rebuttal and defense counsel may not provoke a reply and then assert error).

In sum, then, the trial court did not plainly err in failing to *sua sponte* grant a mistrial because the prosecutor's comment was hyperbole, not a misstatement of the law that would have misled the jury. Furthermore, the trial court could not have been said to have plainly erred when any error that may have been caused by the prosecutor's statement could have been cured by a less drastic remedy than a mistrial, which was not called for here. Appellant's claim is without merit and should be denied.

III.

APPELLANT'S CLAIM THAT THE TRIAL COURT COMMITTED PLAIN ERROR BY NOT DECLARING A MISTRIAL *SUA SPONTE* WHEN THE STATE ALLEGEDLY MADE A REFERENCE TO APPELLANT'S FAILURE TO TESTIFY SHOULD BE DENIED WITHOUT EXPLICATION BECAUSE APPELLANT'S FAILURE TO OBJECT IS PRESUMED TO BE A MATTER OF TRIAL STRATEGY. MOREOVER, THE TRIAL COURT DID NOT ERR, PLAINLY OR OTHERWISE, IN FAILING TO *SUA SPONTE* DECLARE A MISTRIAL IN RESPONSE TO THE STATE'S CLOSING ARGUMENT BECAUSE THE STATE'S ARGUMENT DID NOT MAKE A REFERENCE, DIRECT OR INDIRECT, TO APPELLANT'S FAILURE TO TESTIFY IN THAT THE COMMENT MADE NO REFERENCE TO APPELLANT AND, IN CONTEXT, WAS AN OBLIQUE CRITIQUE OF DEFENSE COUNSEL'S CLOSING ARGUMENT, THE ALLEGED ERROR COULD HAVE BEEN CURED BY A REMEDY LESS DRASTIC THAN A MISTRIAL, AND MANIFEST INJUSTICE DID NOT RESULT FROM THE TRIAL COURT'S CONDUCT.

Appellant contends that the trial court plainly erred because it failed to *sua sponte* declare a mistrial when the state allegedly made a direct reference to appellant's failure to testify.

At the beginning of the rebuttal portion of closing argument, the state argued as follows:

> This is an easy case. I think Mr. Reed was – excuse the phrase repeatedly, if you believe their testimony when talking about the state's witnesses, you should believe Mr. McQuinn when he talks about the devil but don't believe him when he talks about setting the fire twice. If you believe their testimony the only person that he didn't ask that question about, you know who that was. Sure you do. He said, "Well, if you believe the state." Well, I'm not asking you to believe the state. I'm not asking you to believe Mr. Reed. I'm asking you to look at all the facts and to determine what happened that night . . .

(Tr. 505-506).

Appellant contends that this comment was a direct reference to appellant's exercise of his Fifth Amendment right not to testify (App.Br. 56-57).

Appellant did not object to the state's comment. Claims of error may be waived if no objection is made at trial. ***State v. Parker***, 886 S.W.2d 908, 922-923 (Mo.banc 1994), *cert. denied*, 115 S.Ct. 1827 (1995). "This Court will not review those claims not preserved for appeal, and relief should be rarely granted on assertion of *plain error* to matters contained in closing argument, for trial strategy looms as an important consideration and such assertions are generally denied without explication." ***State v. Clay***, 975 S.W.2d 1212, 134 (Mo.banc 1998), *cert. denied* 119 S.Ct. 834 (1999); ***State v. Cobb***, 875 S.W.2d 533, 537 (Mo.banc 1994), *cert. denied*, 115 S.Ct. 250 (1994). The failure to object during closing argument is more likely a function of trial strategy than of error. ***State v. Boyd***, 844 S.W.2d

524, 529 (Mo.App.E.D. 1992). ***See also State v. Tokar***, 918 S.W.2d 753, 768 (Mo.banc 1996), *cert. denied*, 519 U.S. 933 (1996).

Moreover, in the absence of an objection, the trial court's options are narrowed to uninvited interference with summation and a corresponding increase of error by such intervention. ***State v. Clemmons***, 753 S.W.2d 901, 907-908 (Mo.banc 1988), *cert. denied*, 488 U.S. 948 (1988). Had objection been made, the trial court could have taken appropriate steps to make corrections. ***State v. Kempker***, 824 S.W.2d 909, 911 (Mo.banc 1992). A party cannot fail to request relief, gamble on the verdict, and then if adverse, request relief for the first time on appeal. ***State v. McGee***, 848 S.W.2d 512, 514 (Mo.App.E.D. 1993).

In the case at bar, appellant's failure to object to the remark in question at trial deprived the trial court of the opportunity to take corrective measures short of a mistrial, and is fatal to his claim on appeal. This is because an admonition to the jury normally will be sufficient to cure any prejudicial effect of prosecutorial comments. ***State v. Nolen***, 872 S.W.2d 660, 662 (Mo.App.S.D. 1994).

Even if appellant's claim is reviewed, "Relief should rarely be granted on an assertion of plain error with respect to a closing argument." ***State v. Smith***, 32 S.W.3d 532 (Mo.banc 2000). Even when a comment is improper, a conviction will be reversed only where it is established that the comment in question had a decisive effect on the jury's determination. ***State v. Winfield***, 5 S.W.3d 505, 516 (Mo.banc 1999), *cert. denied*, 528 U.S. 1130 (2000). The burden is on the defendant to prove the decisive significance of the complained of comment. ***Id.***

"The 'plain error' rule is to be used sparingly and may not be used to justify a review of every point that has not been otherwise preserved for appellate review." ***State v. Roberts***, 948 S.W.2d 577, 592 (Mo.banc 1997), *cert. denied*, 118 S.Ct. 711 (1998). Appellant must demonstrate that manifest injustice or a miscarriage of justice will occur if the error is not corrected. ***Id.*** "'[U]nless a claim of plain error facially establishes substantial grounds for believing that 'manifest injustice or miscarriage of justice has resulted,' this Court will decline to exercise its discretion to review for plain error under Rule 30.20." ***Id., citing State v. Brown***, 902 S.W.2d 278, 284 (Mo.banc 1995), *cert. denied*, 516 U.S. 1031 (1995).

"Relief under the plain error standard is granted only when an alleged error so substantially affects a defendant's rights that a manifest injustice or miscarriage of justice inexorably results if left uncorrected. Appellate courts use the plain error rule sparingly and limit its application to those cases where there is a strong, clear demonstration of manifest injustice or miscarriage of justice. The determination of whether plain error exists must be based on a consideration of the facts and circumstances of each case. A defendant bears the burden of demonstrating manifest injustice or miscarriage of justice." ***State v. Varvera***, 897 S.W.2d 198, 201 (Mo.App., S.D. 1995) (citations omitted).

The trial court did not plainly err in failing to *sua sponte* declare a mistrial after the state's comment. Contrary to appellant's assertions, the prosecutor's comment did not constitute a direct reference to appellant's failure to testify. "A direct reference to an accused's failure to testify is made when the prosecutor uses words such as "defendant," "accused" and "testify" or their equivalent." ***State v. Neff***, 978 S.W.2d 341, 344 (Mo.banc

1998). "An indirect reference is one reasonably apt to direct the jury's attention to the defendant's failure to testify." ***Id.*** An indirect reference requires reversal only if there is a calculated intent to magnify defendant's decision not to testify so as to call that decision to the jury's attention. ***Id.***

The prosecutor's comment in the present case did not make a direct reference to appellant's failure to testify. It made no reference to "defendant" or "the accused" or anything of the sort.

The prosecutor's comment in the present case is not even an indirect reference to appellant's failure to testify. This statement was not reasonably apt to direct the jury's attention to the fact that appellant did not testify. Rather, the statement directed the jury to consider the evidence of people who *did* testify.

In context, the prosecutor was commenting on defense counsel's closing argument, in which defense counsel used the phrase "if you believe their testimony" with reference to the testimony of state's witnesses, Sharon Smith, Michael Croucher, Steve McQuinn, and Jay Dix. The defense's argument was that if the jury believed their testimony, then the jury would have to find that the murder did not occur around or about midnight as the state asserted it did, because their combined testimony demonstrated it was not possible (Tr. 489-492). The state's comment in rebuttal was that defense counsel pointedly did not include the testimony of the defense witness when defense counsel argued that "if you believe that testimony," the jury would have to reject the state's theory of the case and find for appellant.

That witness to which the state obliquely referred could not have been appellant because he was not a witness in this case, and the context of the argument was referring to people who actually testified. The state, in essence, was arguing that defense counsel had picked and chose what and whom to believe of the state's witnesses, but did not dare do so with reference to the defense witnesses.

The "only person" the state's oblique comment referred to had to be the defense psychiatrist, Dr. Innis, the only defense witness who actually provided a defense.[4] The only real issue in this case was whether appellant knew and appreciated the nature, quality and wrongfulness of his acts that night. Part of the state's attack during cross-examination of Dr. Inniss, the defense psychologist, was that she had not considered all of the facts in determining that appellant could not have deliberated on the crime (Tr. 410-412, 431-439). Then on redirect, when defense counsel asked Dr. Inniss to assume the facts were as the state hypothesized as to whether the murder had occurred around midnight and whether that would change her opinion, she said that she would have to consider it possible that appellant did know, understand, and appreciate the wrongfulness of his conduct if the murder had occurred as the state hypothesized (Tr. 456-457).

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[4]The other two defense witnesses were appellant's mother, Dela Elam, appellant's aunt, Sharon Foster, who mostly testified as to family dynamics.

In closing argument, then, defense counsel, using the testimony of the state's witnesses, tried to argue that even under their testimony, the state's theory of how the murder occurred could not be believed. The state, in its comment on rebuttal, was observing that defense counsel had pointedly glossed over the glaring inconsistency in its own key witness's testimony, that of Dr. Inniss, because Dr. Innis, when presented with the state's theory as to how the murder occurred, testified that if that theory were true, she would have to seriously consider it a possibility that appellant did know and appreciate the nature, quality and wrongfulness of his acts (Tr. 456-457).

The state's comment did not directly reference appellant and thus could not be a direct reference to appellant's failure to testify. The context of the state's comment and the theory of the state's case demonstrate that the state's oblique comment was not an indirect to appellant's failure to testify either, as the comment was not reasonably apt to direct the jury to the fact that appellant did not take the stand. And even if the statement could be considered an indirect reference to appellant's failure to testify, it did not rise to plain error as there was no manifest injustice or miscarriage of justice.

Even where there has been a *direct* reference made to a defendant's failure to testify, in the absence of a timely objection thereto, courts have found no error. ***State v. Neff***, ***supra*** at 345. ***State v. Kempker***, 824 S.W.2d 909, 911 (Mo.banc 1992); ***State v. Dees***, 916 S.W.2d 287, 296 (Mo.App.W.D. 1995); ***State v. Dewey***, 869 S.W.2d 834, 838 (Mo.App.W.D. 1994). An objection to the prosecutor's comment would have allowed the trial judge to take appropriate action and to make a correction. ***Kempker, supra; Dewey, supra***. "[P]rejudice

from such comments can normally be cured by an instruction to the jury." ***Dees, supra.*** As noted above, by failing to object, appellant denied the trial court the opportunity to avoid prejudice by means of an instruction. ***Kempker, supra; Dees, supra; Dewey, supra.***

The bottom line is that the trial court was able to hear the state's comment in context and could make a better determination as to whether it was necessary under the circumstances to make what would have been an "uninvited interference with summation and a corresponding increase in the risk of error by such intervention." ***State v. Stewart***, 18 S.W.3d 75, 84 (Mo.App.E.D. 2000). This is precisely why plain error relief for matters contained in closing argument is rarely granted, "for trial strategy looms as an important consideration and such assertions are generally denied without explication." ***State v. Stewart***, ***supra.*** The trial court was in a better position to make a determination as to whether the state's comment even warranted relief, let alone what relief. Appellant should not be allowed to benefit now from his failure to give the trial court even the opportunity to grant some form of relief, if indeed any had been necessary.

The Eighth Circuit Court of Appeals has held that a trial court does not err when it fails to grant a mistrial *sua sponte*, ***Branch v. State of Minnesota***, 130 F.3d 305 (8th Cir. 1997), *cert. denied*, 118 S.Ct. 1565 (1998) because a *sua sponte* grant of a mistrial could be considered as interfering with a defendant's trial strategy. In ***State v. Marlow***, 888 S.W.2d 417, 420 (Mo.App.W.D. 1994), the Court of Appeals found no error when the trial court did not *sua sponte* grant a mistrial when the prosecutor made statements regarding the defendant's failure to testify. The Court of Appeals noted that if the trial judge had granted

a mistrial on its own motion because of the prosecutor's comments, the Double Jeopardy Clause would have precluded a retrial, since any prejudice could have been cured by less drastic action, and therefore there would have been no "manifest necessity" for a mistrial. ***Id.*** ***See also State v. Weeks***, 982 S.W.2d 825, 838, n. 13 (Mo.App.S.D. 1998) (discussing the untenable position that a trial court is placed in because of double jeopardy consequences if it grants a mistrial on its own motion).

In sum, then, the trial court did not plainly err in failing to *sua sponte* grant a mistrial because the state's argument made no reference, direct or indirect, to appellant's failure to testify. Appellant's point is without merit and should be denied.

CONCLUSION

In view of the foregoing, respondent submits that appellant's convictions and sentences be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) of this Court and contains _____words, excluding the cover, this certification and the appendix, as determined by WordPerfect 6 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this ____ day of October, 2002.

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